JD–136–98
Cranston, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PREFERRED ELECTRIC CO., INC.

and

Cases 1–CA–33366
1–CA–34629
1–CA–35399
1–CA–35462

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 99, AFL-CIO

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of Boston, MA,
for the General Counsel.
Girard R. Visconti, Esq.,
of Providence, R.I.,
for the Respondent.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: The charge and amended charge in case 1–CA–33366 was filed by IBEW Local 99, Union herein, on September 14, 1995 and October 3, 1995, respectively, against Preferred Electric Co., Inc., Respondent herein.

On October 31, 1995 the National Labor Relations Board, by the Regional Director for Region 1, issued a Complaint alleging that Respondent violated Sections 8(a)(1) and (3) of National Labor Relations Act, herein the Act, when it failed and refused to consider for hire and failed to hire 7 union applicants for employment.

On May 23, 1996 the General Counsel, Union, and Respondent settled this case with the posting of a notice and the signing of a settlement agreement wherein Respondent agreed to comply with all the terms and provisions of the notice.

In the notice Respondent agreed that "[It] will not refuse to consider for hire and/or refuse to hire job applicants because of their affiliation and/or membership in the International Brotherhood of Electrical Workers, Local Union No. 99, AFL-CIO, or any other labor organization."

On July 30, 1996 the National Labor Relations Board, by the Regional Director for Region 1, notified Girard R. Visconti, counsel for Respondent, that Respondent "having satisfactorily complied with the requirements of the Settlement Agreement. . . this case [1–CA–33366] is hereby closed. Please note that the closing is conditioned upon continued observance of the terms of the Settlement Agreement and does not preclude further proceedings should subsequent violations occur."

Thereafter the Union filed new charges against Respondent alleging as unlawful Respondent's refusal to consider for hire or hire union applicants for employment.

More specifically the Union filed a charge and an amended charge in case 1–CA–34629 on October 15, 1996 and March 12, 1997, respectively. On July 10, 1997 the Union filed the charge in case 1–CA–35399. On August 1, 1997, October 29, 1997, November 12, 1997 and January 6, 1998, the Union filed the charge and 3 amended charges in case 1–CA–35462.

Region 1 investigated the charges and amended charges in cases 1–CA–34629, 35399, and 35462 and on January 14, 1998 the National Labor Relations Board, by the Regional Director for Region 1, issued an Amended Consolidated Complaint, herein Complaint, which alleges, as amended at the hearing, that Respondent violated Section 8(a)(1) and (3) of the Act when it failed to consider for hire or hire 14 union applicants for employment in August 1996 and an additional 34 union applicants for employment in April 1997 and the Complaint moves to revoke the settlement in case 1–CA–33366 and litigate the allegations in that earlier case.

Respondent filed an Answer in which it denied it violated the Act in any way and that the settlement in case 1–CA–33366 should not be set aside.

Suffice it to say I must first determine if Respondent violated the Act subsequent to the settlement in case 1–CA–33366. If I find that Respondent violated the Act in 1996 or 1997 then I must decide if the violations or violation breached the settlement agreement in case 1–CA–33366 and if so then decide the allegations in case 1–CA–33366. If, on the other hand, I conclude that the Act was not violated by Respondent in 1996 or 1997 then I will not revoke the settlement in the earlier case and will recommend that the Complaint which issued on January 14, 1998 be dismissed in its entirety.

A hearing was held before me in Providence, Rhode Island, on April 27 and April 28, 1998.

Based upon the entire record in this case, to include post hearing briefs submitted by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation with an office and place of business in Cranston, Rhode Island, has been engaged as an electrical contracting company.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Overview

As noted above the first order of business for me is to determine if the Act was violated by Respondent in 1996 or 1997 and if it was then I must decide if that violation or violations will permit the revocation of the settlement agreement in the 1995 case.

The events of 1995, 1996, and 1997 were part of a "salting" campaign directed by the Union against Respondent.

"Salting" is the word given to the practice of union affiliated applicants for employment seeking to secure employment with non-union employers and then attempting to organize the employer.

The "salting" case of 1995 was settled as noted above. The person in charge of hiring for Respondent in 1995 was its then owner and president Ronald Burati. Burati left Respondent in February 1996 when Respondent was bought by Arthur Bellemore and Robert Farland. Bellemore became president and was in charge of hiring. Farland was vice president and general superintendent. Both Bellemore and Farland worked for Respondent prior to Burati's departure.

Respondent is a small corporation and in May 1997 had only two people working for it, i.e., Bellemore and Farland.

Respondent bids jobs and when it gets work and need employees to do the job it hires electricians and others.

If Respondent refused to consider for hire or hire applicants for employment because of their union membership this would be a violation of Section 8(a)(1) and (3) of the Act. See, e.g., *NLRB v. Town & Country Electric,* 116 S. Ct. 450 (1995); *Casey Electric*, 313 NLRB 774 (1995), *Walz Masonry, Inc.*, 323 NLRB No. 216 (1997). On the other hand if Respondent hires applicants for employment in a non- discriminatory manner it has not violated the Act.

B. Change In Policy

When Ronald Burati was owner and president of Respondent it was his practice to keep on file all applications for employment the Respondent received whether the applicant was hired or not and if hired regardless of how long they remained employed by Respondent.

In February 1996 when Arthur Bellemore became president and the person in charge of hiring he changed Burati's policy and instituted a new policy that Respondent would no longer retain employment applications or files on applicants unless the applicant was hired and remained in Respondent's employ for over one month.

This policy was implemented after the 1995 "salting" effort when that case was still pending disposition and before the 1996 and 1997 "salting" efforts.

It is alleged that this change of policy was a violation of Section 8(a)(1) of the Act in order to assist Respondent in discriminating against union affiliated applicants for employment.

Bellemore credibly testified that the policy was implemented because with a very small office staff, apparently he and a part time secretary at times or at other times just him, it was too cumbersome and bothersome to maintain these files so he threw them out in the trash.

I do not find the implementation of the new policy to be a violation of the Act since I credit Bellemore that his motivation in no longer maintaining the material was as he testified to before me. And his motivation was not to aid or abet discrimination against union members or to make it more difficult for them to prove discrimination.

C. 1996 "Salting"

On August 18 and August 19, 1996 Respondent ran blind ads in the Providence Journal newspaper.

Union organizer John Poland saw the ads and with their permission on August 18, 1996 sent the resumes of 14 union members to the PO Box listed in the newspaper ad seeking employment. The 14 resumes of the applicants seeking employment were sent in separate envelopes. Poland kept copies of all resumes sent to the PO Box. Poland didn't remember if the envelopes the resumes were sent in had the union logo on them or not. Poland wrote "voluntary union organizer" on some but not all of the resumes.

Respondent received these 14 resumes reflecting that 14 qualified journeymen electricians were seeking employment. Twelve (12) of the 14 resumes clearly indicated union affiliation on the part of the applicant. Two (2) of the resumes did not, i.e., that of Brian Colvin and Allen Durand.

Thirteen (13) of the 14 union applicants never received an offer of employment or were asked to come in for an interview. Only one, i.e., Brian Colvin, claimed to have received a call from Respondent. Colvin testified that in July 1997 when he was working elsewhere he received a phone call at home apparently out of the blue which he admits caught him off guard in which phone call a man who claimed to be from Preferred Electric asked if he were interested in work. Colvin was stunned and simply said he wasn't interested. No one from Respondent admits to making the call and I suspect that Colvin thinks in good faith that the person on the phone said "Preferred Electric" but was so stunned by the call that he probably didn't hear it right. Under the circumstances I find that Respondent did not call Colvin.

If Respondent had called Colvin it would manifest disparate enforcement of its rule of not keeping or filing job applications unless Respondent hires the person and the person stays longer than one month.

The Respondent did hire 8 electricians about the time it ran the blind ads. The electricians were:

1. Thomas Limoges hired August 8, 1996
2. Mark Jeschke hired August 20, 1996
3. Roger Boucher hired August 21, 1996
4. William Faber hired August 24, 1996
5. Thomas Jones, Sr. hired September 3, 1996
6. John Dimitris hired September 24, 1996

7. Rene Geoffroy hired September 26, 1996
8. Daniel Shroyer hired October 23, 1996

None of the union applicants were hired. Bellemore tried to explain why these eight were hired and not any of the union applicants.

Bellemore testified that he tried to hire a former employee of Respondent named Kenneth Stafford who was working elsewhere. Stafford was unavailable but he recommended Thomas Limoges to Bellemore and based on Stafford's recommendation Respondent hired Limoges.

Thomas Limoges in turn recommended to Bellemore that Respondent hire Daniel Shroyer and based on that recommendation Respondent hired Shroyer on October 23, 1996 more than two months after Limoges was hired.

Bellemore hired Mark Jeschke because Jeschke is a personal friend of Respondent's vice president and general superintendent Robert Farland. Farland testified that Jeschke's father is a good friend of his.

Bellemore hired Roger Boucher because he was referred by vice president Robert Farland. Farland, however, based his referral on someone else but couldn't remember at the hearing before me who recommended Boucher to him.

Bellemore hired William Faber on August 24, 1996 because Faber was 59 years old and had spent the better part of his life as an electrician and impressed Bellemore in an interview after Faber responded to a newspaper ad.

Bellemore hired Thomas Jones, Sr., on September 13, 1996 because Jones was a master electrician and available. It is well known that an electrician with a masters license has demonstrated a very high competence level in his field. Interestingly enough one of the 14 union applicants, Scott McMullen was also a master electrician.

Bellemore hired Rene Geoffroy on September 26, 1996 based on the recommendation of Bellemore's long time friend Thomas Donatelli.

Bellemore hired John Dimitris on September 24, 1994 because Dimitris needed a job and Bellemore felt sorry for him. Apparently Bellemore felt sorry for Dimitri with good cause because Dimitris only lasted 30 minutes (1/2 hour) on the job and was let go for incompetence.

The resumes of the 14 "salts" indicate that they were clearly qualified but I credit the reasons advanced by Bellemore for why he hired the people he hired. Since he did not fail or refuse to hire the "salts" because of their union affiliation I conclude that the Act was not violated.

D. 1997 "Salting"

On April 29, 1997, April 30, 1997, and May 1, 1997 Respondent ran blind ads in the Providence Journal advertising for electricians.

Union organizer John Poland gathered together the resumes of 34 union journeyman electricians and sent their resumes to the PO Box listed in the Providence Journal ad. The resumes went to Respondent and none of the people whose resumes were sent to Respondent

were hired or even called for an interview. As with the 14 "salts" in 1996 the 34 people whose resumes were sent in 1997 were all bona fide applicants for employees whose resumes were sent by John Poland to Respondent with their consent and approval.

Respondent had two jobs in mind when it ran these ads in late April and early May 1997, namely, the Brown University job and the Gemini Hotel job. The Gemini Hotel job was postponed and Respondent, as a result, needed less electricians then it thought it would because the electricians working for Respondent could finish up the Brown University job and move on to the delayed Gemini Hotel job without Respondent needing to have a crew for each job.

Suffice it to say Arthur Bellemore did hire 4 electricians around the time the 1997 ads ran in the newspaper.

Bellemore hired Richard Cambio on June 1, 1997. Vice president Robert Farland recommended Cambio to Bellemore. Cambio had been a member of IBEW Local 99 through March 1997 when he took an honorary withdrawal, that is, he left the Union in good standing and could renew his membership if he chose to do so. Bellemore credibly testified that he thought Cambio was still a union member when he hired him. In addition Respondent in 1996 and 1997 hired former Local 99 union member Dean Rossi and in 1997 offered a job to a Native American electrician named Stanton in connection with a job for the Narraganset Indian tribe. Local 99 member Stanton, however, never showed up for work.

Bellemore hired Mark Jeschke on June 2, 1997. Jeschke had been an personal friend of vice president Robert Farland and had been hired in August 1996. He was rehired on June 2, 1997.

Bellemore hired David Loren on June 5, 1997 based on an interview with Loren. None of the 34 "salts" was granted an interview.

Bellemore hired Richard Matthews on June 24, 1997. Bellemore believes that Matthews had been recommended to him but can't remember who recommended him.

At first blush it appears that there was disparate treatment between the way the 34 union "salts" were treated in the application process and the way David Loren was treated. But in the absence of union animus I do not find a violation.[1]

Bellemore basically testified and I found him credible that he considers, i.e., looks at and examines, all applications he received. He has no particular recollection of resumes being received by him that were in envelopes with the Union logo or Union on it. If he has no need for help he discards the applications without reviewing them. He remembered considering all applications in 1996 but he may have discarded applications in 1997 if he was not in need of employees.

There was no union animus shown in this case except back in 1995 in connection with case 1–CA–33366 which later settled.

[1] Nine (9) of the 34 union applicants in 1997 were master electricians according to their resumes. However, in 1997 Bellemore didn't hire anyone specifically because they were master electricians. A decision to hire someone can be lawful even though someone else may select better qualified or different people than the ones selected.

Paul Stromberg applied for an electrician's job with Respondent in August 2, 1995. Stromberg was a credible witness and testified that Respondent's then owner and president Ronald Burati, when he found out Stromberg was a union member told Stromberg he could not hire him because of his union status but only place his application on file. Burati never testified before me and, of course, never testified in case 1–CA–33366 because that case settled and never went to trial.

If Burati were still the owner and president of Respondent and making hiring decisions in 1996 and 1997 the results in this case might be different. But Burati left Respondent in February 1996. The hiring function was taken over by Arthur Bellemore whom I found basically credible albeit a little forgetful when it came to exactly why he hired some of the people he hired in 1996 and 1997 and to how he treated the union resumes he received in 1996 and 1997.

During the trial Board Agent Claire Powers testified that in investigating the 1996 "salting" case she went to the law office of Girard Visconti to review some documents. She testified that she saw the original of Paul Stromberg's 1995 application and two other original applications but she can not remember the names of the applicants but believe one name was "Lowe." Robert Lowe was one of the alleged discriminatees in the 1995 "salting" case. Powers claims that the originals of these three applications bore the words "union do not hire."

Powers testified that she brought this to the attention of Visconti. Visconti testified that she never brought this to his attention and it is inconceivable if she had that he would not have immediately checked it out by personally examining the applications and, of course, would then have a clear recollection of the incident. And he never at any time saw this language on any application. However, he did see the word "union" on some applications and he had a pile of applications of applicants not hired.

The original applications from the 1995 "salting" case were subpoenaed for the case before me but Respondent claims it can not locate the original applications to include that of Paul Stromberg.

Powers and Visconti both impressed me as credible witnesses and it is obvious to me that both testified to what they thought was the truth. The only way to reconcile the matter would be to look at the original applications from 1995 but they have not been produced and were lost when in the possession of either Respondent or Respondent's counsel.

The "smoking gun" language of "union do not hire" were not on the 1996 or 1997 "salt" applications but were allegedly on the three of the 1995 "salt" applications. The 1995 "salting" case, of course, settled.

Based on what Burati said to Stromberg in August 1995 I would conclude that the language "union do not hire" even if not written down motivated Burati in his hiring decisions in 1995.

But Burati is no longer associated with Respondent and had no say with respect to who was hired in 1996 and 1997. Since I credit the testimony of Arthur Bellemore I conclude that

the Act was not violated in 1996 and 1997 and the settlement in the 1995 case should therefore not be revoked.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. Respondent did not in 1996 and 1997 violate the Act as alleged in the Complaint and therefore the settlement of the 1995 case should not be revoked.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[2]

ORDER

The Complaint is dismissed in its entirety.[3]

Dated, Washington, D.C. August 26, 1998.

Martin J. Linsky
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] The General Counsel's Motion for Permission to Reply to Respondent's Post-Hearing Brief is granted and the General Counsel's Motion to Reopen the Record for Receipt of Exhibit is granted. The arguments advanced by the General Counsel are persuasive and the charge in case 1–CA–34629 is not time barred by Section 10(b) of the Act. The charge was timely filed and timely brought to the attention of Respondent.